CONCLUSION

As this Court stated in *Branzburg v. Hayes* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972): "Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle [is] that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common law or statutory privilege. . . ." (*Id.* at 688.) Where the state seeks evidence of criminal sexual child abuse by priests, the church may not interpose the First Amendment religion clauses in order to shield such evidence from review by the grand jury. (*Society of Jesus of New England,* 808 N.E.2d 272, 441 Mass. 662; *People v. Campobello,* 810 N.E.2d. at 317, 348 Ill.App.3d 619.) The People of the State of California respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 05-1017

In The Supreme Court of the United States

THE ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES,

Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Three

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner replies to the Opposition of the District Attorney as follows:

First, the Opposition ignores the rulings cited in the Petition for a Writ of Certiorari ("Petition") permitting criminal and tort actions to proceed against religious entities provided the inquiry is limited so that it does not intrude into ecclesiastical matter, such as pastoral and episcopal counseling. *See* Petition at 12. Both *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), and *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004), recognize this principle, which has been overridden in this and other cases across the country in the current atmosphere arising from pervasive newspaper coverage of clergy sexual abuse cases.

Second, petitioner does not contend that its priests are immune from criminal and/or tort liability. It merely contends that any such case must be prosecuted without intruding into the pastoral and episcopal counseling of a bishop with one of his priests.

Third, the communications at issue preceded the new zero tolerance policy of the United States Conference of Catholic Bishops adopted in 2002. They also either preceded California's mandated reporting law (which was extended to clergy members in 1997) or do not contain reportable material. 1996 Cal. Stat. ch. 1081 § 3(c)(1); 1996 Cal. ALS 1081 (codified at Cal. Pen. Code §§ 11165.7(a)(32), 11166(a), 11166(c) (Deering 2006)). The record is undisputed that the communications at issue were made when both the priest and the Vicar for Clergy or Archbishop considered them strictly confidential. SA 82:20-21 (Superior Court Ruling) ("The People agree that, in the Los

Angeles Archdiocese, those communications are kept confidential.").

Finally, the strict-scrutiny test of the First Amendment is not an independent state ground. As Justice O'Connor has explained:

> Generally speaking, *if a state court decides that a particular state action violates both federal and state law, the final state court judgment is not reviewable by the Supreme Court.* For example, if a state court finds that a challenged state action or law violates a state constitution's due process clause and, independently, the fourteenth amendment's due process clause, the United States Supreme Court cannot review the decision. . . .
>
> **If, in contrast, a state court upholds a particular state action on the ground that it offends neither federal nor state law, then the Supreme Court has power to review the state court judgment – though on the federal question only**. Thus, a state court's rejection of both the federal and state due process challenges may be reviewed by the Supreme Court. The decision on the federal grounds in these circumstances could change the result in the case, since the Supreme Court's disagreement with the state court on the federal question would render the challenged state action unlawful.
>
> These . . . two situations present few difficulties.

Justice O'Connor, *Our Judicial Federalism,* 35 Case W. Res. 1, 5-6 (1984) (emphasis added, footnotes omitted); *see also* Stern, Gressman, Shapiro & Geller, *Supreme Court*

Practice (8th ed. 2002) § 3.24, p. 202 (citing Justice O'Connor's statement quoted above); 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4029, p. 413 (2d ed. 1996) ("If challenged [state] action is found valid under both [the federal and state] constitutions, jurisdiction of course exists to review the federal claim.").

Moreover, contrary to the Court of Appeal's decision here, the federal strict-scrutiny test requires case-specific factual findings. *See* Petition at 21-23 (citing authorities to that effect). After this Petition was filed, this Court handed down its decision in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 2006 U.S. LEXIS 1815 (Feb. 21, 2006), re-affirming that the strict-scrutiny test, as adopted in the Religious Freedom Restoration Act (RFRA), does in fact require a case-specific factual analysis. This Court stated:

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" – the particular claimant whose sincere exercise of religion is being substantially burdened. . . . In [*Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)], this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.
>
> * * *

> We do not doubt the validity of these [general governmental] interests, any more than we doubt the general interest in promoting public health and safety by enforcing the Controlled Substances Act, but under RFRA invocation of such general interests, standing alone, is not enough.

Gonzales, 2006 U.S. LEXIS 1815; *25-26, *39. In reaching this conclusion, this Court relied on the same cases and language that petitioner had cited in its Petition, including Justice O'Conner's concurring opinion in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 899-900 (1990), *Sherbert v. Verner,* 374 U.S. 398, 407-408 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205, 221 (1972). *See Gonzales,* 2006 U.S. LEXIS 1815; *25-27; Petition at 21-23.

For the foregoing reasons, the District Attorney's Opposition should be rejected and the Petition for a Writ of Certiorari should be granted.

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